UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BROOKLYN BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, -against- PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections, et al., Defendants.	Case No. 21-CV-7667-KPF **PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiff, the Brooklyn Branch of the NAACP, by its attorneys Elias Law Group LLP and Emery, Celli, Brinckerhoff, Abady, Ward & Maazel LLP, along with the accompanying Pre-Trial Memorandum of Law, hereby submits its Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

New York's Line Warming Ban and its Administration

1. It has long been a crime in New York to provide food, drink, or other sundries to individuals waiting in line to vote—a practice known colloquially as "line warming." The current iteration of this restriction is set forth in Section 17-140 of the New York Election Law ("Section 17-140" or the "Line Warming Ban"), which is titled "Furnishing money or entertainment to induce attendance at the polls." In full, Section 17-140 provides:

> Any person who directly or indirectly by himself or through any other person in connection with or in respect of any election during the hours of voting on a day of a general, special or primary election gives or provides, or causes to be given or provided, or shall pay, wholly or in part, for any meat, drink, tobacco, refreshment or provision to or for any person, other than persons who are official representatives of the board of elections or political parties and committees and persons who are engaged as watchers, party representatives or workers assisting the candidate, except any such

> meat, drink, tobacco, refreshment or provision having a retail value of less than one dollar, which is given or provided to any person in a polling place without any identification of the person or entity supplying such provisions, is guilty of a Class A misdemeanor.

N.Y. Elec. Law § 17-140.

2. In New York, Class A misdemeanors are punishable by up to one year's imprisonment or up to three years' probation and a monetary fine. N.Y. Penal Law §§ 70.15(1); 65.00(3)(b)(i); 80.05(1).

3. The New York State Board of Elections (the "State Board") is a bipartisan agency responsible for enforcing New York's election laws, including the Line Warming Ban. N.Y. Elec. Law §§ 3-102, -104, -107. The State Board also provides guidance to county boards of elections concerning election administration and election law enforcement. *Id.* § 3-102(1); (Ex. P-27). Defendants include members of the State Board, as well as the State Board's co-executive directors, each sued in their official capacities.

4. The New York City Board of Elections (the "City Board") is a bipartisan administrative body composed of commissioners appointed by the city council of the City of New York. N.Y. Elec. Law § 3-200(3). The City Board is tasked with administering elections and operating poll sites within New York City. *See id.* §§ 3-400(9), -402. The City Board is responsible for monitoring compliance with election laws, including the Line Warming Ban, at the polling sites it manages. (Connolly Tr. 96:8–11, 99:19–100:19, 139:2–140:5; Ex. P-27 at NYSBOE 000225).[1] Defendants include the members of the City Board sued in their official capacities.

[1] Citations to "Connolly Tr." refer to the transcript of the deposition of Thomas Connolly, Deputy Executive Director of the State Board of Elections, as a representative of the State Board pursuant to Federal Rule of Civil Procedure 30(b)(6), taken on September 7, 2023.

5. State Board guidance charges the City Board with enforcing the requirements of the New York Election Law at the polls. The State Board's "Guide to Operating a County Board of Elections" charges County Boards with using their "[e]nforcement powers" to "prevent violations of the election process." (Ex. P-27 at NYSBOE 000121, 224). The Guide further specifies that "violation of the elective franchise may include," among other things, "Furnishing money or entertainment to induce attendance at the polls." (*Id.* at NYSBOE 000225). This is a reference to Section 17-140, which is titled "Furnishing money or entertainment to induce attendance at the polls." (Connolly Tr. 139:2–140:5); N.Y. Elec. Law § 17-140.

New York's Voting Lines

6. Long lines at the polls have long been an issue of concern in New York. New York law seeks to ensure that voters do not wait more than thirty minutes to cast their ballots. *See* N.Y. Elec. Law § 3-400(9); 9 N.Y.C.R.R. §§ 6210.19(c)(3), 6210.19(d)(1), 6211.1(b)(2). But, despite these regulations, state officials have reported wait times significantly longer than thirty minutes, particularly in high turnout presidential election years.

7. Long wait times are thus a significant issue of community concern in New York. The State Board of Elections has received complaints from voters about long wait times, dating back more than a decade. (*See, e.g.*, Ex P-29; Ex. P-30; Ex. P-31; Ex. P-32; Ex. P-35; Ex. P-36; Ex. P-51; *see also* Ex. P-42 at NYSBOE 000416 (N.Y.C. Dep't of Investigation Report documenting reports of hours-long wait times during the 2012 election)).

8. Long wait times became a particularly hot-button issue during early voting in 2020—the first presidential election in which early voting was available in New York. (*See* Ex. P-28 at NYSBOE 000243, 250, 259 (Report and Findings of the N.Y. State Senate Elections Committee documenting hours-long wait times during early voting in 2020)). The issue became so widespread that on October 29, 2020, the New York Attorney General issued an advisory to

local boards of elections reminding them of their legal obligations with respect to individuals with disabilities waiting in long lines. (Ex. P-34). The Attorney General's letter reported receiving "a large volume of complaints from voters in counties across the State who have waited in long lines to cast their ballots, in some cases for as many as five hours." (*Id.* at NYSBOE 000299). Civic organizations such as the New York Civil Liberties Union raised similar concerns with state and county elections officials. (*See* Ex. P-37; Ex. P-38; Ex. P-39). Local and national news organizations reported extensively on the issue. (*See, e.g.*, Ex. P-60; Ex. P-61; Ex. P-62; Ex. P-63).

9. The City Board has acknowledged that long wait times are an issue of concern in the community, (Ryan Tr. 88:7–20), and that there have been wait times longer than thirty minutes at early voting locations around New York City, (Ryan Tr. 93:17–96:1).[2]

10. But long wait times are not an issue of concern solely in New York City. On October 28, 2020, while early voting was still ongoing, a group of voters and candidates sued the Ulster County Board of Elections for violation of 9 N.Y.C.R.R. § 6210.19(d)(1), a State Board regulation that requires: "If the voter waiting time at an early voting site exceeds 30 minutes the Board of Elections shall deploy such additional voting equipment, election workers and other resources necessary to reduce the wait time to less than 30 minutes . . . ." (Ex. P-47, Ex. P-48, Ex. P-49; Ex. P-50). As a result of that lawsuit, the Ulster County Board of Elections was ordered to increase early voting hours. (*See* Ex. P-58).

[2] Citations to "Ryan Tr." refer to the transcript of the deposition of Michael J. Ryan, Executive Director of the City Board of Elections, as a representative of the City Board pursuant to Federal Rule of Civil Procedure 30(b)(6), taken on October 6, 2023.

11. Long wait times, specifically in New York City, have been a topic of intense discussion among the members of the State Board of Elections for many years. As early as 2015, former State Board Co-Chair Douglas Kellner raised the issue of "bringing New York City into compliance with the thirty-minute rule for the November 2016 Election" at a meeting of the State Board's commissioners. (Ex. P-43 at NYSBOE 000465). The issue was raised again in a meeting following the 2016 general election. (Ex. P-25 at NYSBOE 000047–53). At a meeting in September 2017, Commissioner Kellner acknowledged that "New York City did many, many things to improve procedures for the last general election," but still had not come into compliance with the thirty-minute rule, prompting the State Board to discuss strategies for reducing lines in New York City. (Ex. P-26 at NYSBOE 000090–93). A few months later, Commissioner Kellner gave a statement to the New York City Council's Committee on Governmental Operations in which he emphasized that "New York City has not complied with [the thirty-minute rule] in its presidential general elections" and that he saw "no meaningful efforts for New York City to come into compliance in 2020." (Ex. P-53 at NYSBOE 000707). Commissioner Kellner gave another statement to the New York City Council's Committee on Governmental Operations and Committee on Oversight and Investigations in November 2018, in which he raised the same concerns. (Ex. P-54 at NYSBOE 000712). In August 2020, Commissioner Kellner wrote a memorandum to his fellow State Board Commissioners, again noting that "New York City has never come close" to satisfying the thirty-minute rule in presidential general elections, and suggesting several steps that could be taken to alleviate long lines in New York City. (Ex. P-55 at NYSBOE 000723–24). And in September 2021, the full State Board gave testimony to the New York Senate's Standing Committee on Elections emphasizing the importance of "poll site preparedness," and noting that "unprepared" poll sites may develop "long lines," and struggle to

"recover an acceptable wait time." (Ex. P-46 at NYSBOE 000527). Commissioner Kellner separately addressed the issue of New York City's failure to comply with the thirty-minute rule. (Ex. P-56 at NYSBOE 000729–30). As recently as 2021, the State Board's staff continued to discuss wait times and capacity issues at poll sites. (Ex. P-40; Ex. P-41).

12. In short, long lines at the polls are a significant topic of public debate and discussion in New York City.

Plaintiff's Mission and Activities

13. Plaintiff, the Brooklyn Branch of the NAACP ("Plaintiff" or "Brooklyn NAACP") is a nonpartisan organization dedicated to "remov[ing] all barriers of racial discrimination through democratic processes, educat[ing] voters on their constitutional rights, and tak[ing] all lawful action to secure the exercise of those rights." (Decl. of L. Joy Williams ¶ 3 ("Williams Decl."); *see also* Decl. of Joan Alexander Bakiriddin ¶ 2 ("Bakiriddin Decl.")). Brooklyn NAACP is extremely active and well known among Brooklyn voters. For years, it has engaged in "voter outreach, education, and activism" to improve access to the franchise. (Williams Decl. ¶ 4; *see also* Bakiriddin Decl. ¶ 2).

14. These efforts include, among other things, educating voters by distributing literature with information about how to check one's voter registration, how to register to vote, how to find a polling site, and how to view a sample ballot. (Ex. P-9; Bakiriddin Decl. ¶ 11). Brooklyn NAACP aims to inform voters about relevant deadlines and eligibility requirements. (Ex. P-11; Bakiriddin Decl. ¶ 5). Brooklyn NAACP also educates voters about the mechanics of voting. For example, it undertook significant outreach and education efforts to inform voters about ranked choice voting, which was used for the first time in New York City's 2021 municipal elections. (Ex. P-2; Ex. P-14; Ex. P-17; Williams Decl. ¶ 8). These educational communications

are often combined with a message encouraging voters to exercise the franchise. (*E.g.* Ex. P-10 (encouraging voters to "Get 5 friends, family, and neighbors to vote with you Nov. 3rd!")).

15. In addition to voter education, Brooklyn NAACP has an active voter registration and "Get Out the Vote" ("GOTV") program aimed at encouraging voters to exercise their right to vote. (Bakiriddin Decl. ¶¶ 4-5; Williams Decl. ¶¶ 6-8; Ex. P-4; Ex. P-5 at NAACP000048; Ex. P-15). It accomplishes this through various outreach strategies, such as social media, "text banking" and phone banking. (Ex. P-2 at NAACP000026; Ex. P-4; Ex. P-12; Williams Decl. ¶ 7; Bakiriddin Decl. ¶ 5). Brooklyn NAACP members also conduct in-person outreach activities at local churches, libraries, colleges, and YMCAs, and at community events such as parades and street fairs. (Ex. P-2 at NAACP000026; Ex. P-4 at NAACP000040; Ex. P-5 at NAACP000048; Williams Decl. ¶ 8; Bakiriddin Decl. ¶ 11).

16. In 2020 alone, Brooklyn NAACP reached out to tens of thousands of voters and organized "Souls to the Polls" events to encourage churchgoing voters to take advantage of early voting, as well as a "Power to the Polls Caravan." (Ex. P-18; Ex. P-19; Ex. P-20; Williams Decl. ¶ 19). Those efforts have continued through subsequent election cycles. (*See e.g.* Ex. P-13 (spreadsheet summarizing Brooklyn NAACP's 2021 GOTV and voter outreach activities); Bakiriddin Decl. ¶ 5).

17. As a result of its extensive work to support voters in Brooklyn, Brooklyn NAACP is well known and trusted by Brooklyn voters. (*See* Williams Decl. ¶¶ 5, 10, 20; Bakiriddin Decl. ¶¶ 5, 12, 18). When Brooklyn NAACP members conduct in-person voter outreach, they wear NAACP-branded apparel and are accompanied by NAACP-branded signage and literature. (Williams Decl. ¶¶ 10, 20, 37; Bakiriddin Decl. ¶¶ 11-12). As its President explains, Brooklyn NAACP believes that when it "engage[s] in voter education, GOTV, or voter support activities, it

is important that voters know the information and support they are receiving is coming from a recognized, trusted, and well-respected organization." (Williams Decl. ¶ 10).

18. Brooklyn NAACP often provides food at Branch events such as membership meetings and GOTV drives. (*E.g.* Ex. P-1 (Branch holiday party); Ex. P-3 ("Celebration Picnic"); Ex. P-7 at NAACP000083–84 (membership meeting); Ex. P-6 at NAACP000213 ("Civic Engagement Session"); Ex. P-21 (Ballots & BBQ); Williams Decl. ¶ 6; Bakiriddin Decl. ¶¶ 6, 11). During the height of the COVID-19 pandemic, Brooklyn NAACP also distributed personal protective equipment (PPE) and "COVID-19 care packs" to voters in connection with its voter outreach. (Bakiriddin Decl. ¶ 13; Ex. P-6; *see also* Ex. P-4 at NAACP000040).

19. Long lines at the polls are a significant issue of concern for Brooklyn NAACP. (Williams Decl. ¶¶ 3-5; *see also* Ex. P-24 (survey of Brooklyn NAACP members who experienced long voting lines)). Although it has not previously distributed food or water at polling sites, Brooklyn NAACP *has* provided support to voters through other means. During early voting in 2020—the height of the COVID-19 pandemic—Brooklyn NAACP volunteers held an "early vote kickoff rally" on the first day of in-person early voting at the Barclay's Center in Brooklyn. (Ex. P-59; Ex. P-8; Williams Decl. ¶ 19; Bakiriddin Decl. ¶ 14). Volunteers distributed face shields donated by a partner organization as well as cloth face masks bearing the NAACP logo to voters waiting in line. (Ex. P-59; Williams Decl. ¶ 21; Bakiriddin Decl. ¶ 14). Brooklyn NAACP members who participated in the event testify that, by supporting voters in this way, they wished to communicate to voters that they value the voters' safety and health and celebrate their exercise of the right to vote under the difficult circumstances imposed by COVID-19. (Williams Decl. ¶ 23; Bakiriddin Decl. ¶¶ 14, 16). Voters who received PPE indicated to Brooklyn NAACP volunteers that they understood and appreciated this message of support: In addition to verbal expressions of

gratitude and solidarity, voters greeted the volunteers—in their recognizable Brooklyn NAACP apparel—with a thumbs up or a raised fist, demonstrating that they understood Brooklyn NAACP's activity to communicate at least some message. (Williams Decl. ¶ 29). Voters also approached Brooklyn NAACP members with questions about the voting process. (Bakiriddin Decl. ¶ 18).

20. Anticipating more unacceptable wait times at New York City polling locations during a high-turnout 2024 presidential election, Brooklyn NAACP has sought out new ways to encourage voters to wait out long lines and express its message of solidarity and support. (Williams Decl. ¶¶ 31–33; Bakiriddin Decl. ¶¶ 20-22). To that end, Brooklyn NAACP has made plans to provide "nonpartisan support and assistance to voters waiting in line," "to convey the importance of them staying in line, the importance of voting, and emphasize that everyone's vote counts." (Williams Decl. ¶¶ 33, 38; Bakiriddin Decl. ¶ 21-22). But the Line Warming Ban has thus far prevented Brooklyn NAACP from doing so. (Williams Decl. ¶¶ 32–33, 36, 39; Bakiriddin Decl. ¶ 21).

21. If not for the Line Warming Ban, Brooklyn NAACP and its members and volunteers "would provide sundries such as bottled water, granola bars, donuts, potato chips, or pizza to voters already waiting in the long lines that continue to plague the Branch's surrounding communities." (Williams Decl. ¶ 32). Brooklyn NAACP's President testifies that by doing so, Brooklyn NAACP "seeks to convey a celebration of our democracy and of the dedicated voters who endure weather and long lines to have their voices heard, as well as the rejection of voter suppression through long lines and wait times that severely burden our most fundamental rights." (*Id.* ¶ 33). Joan Bakiriddin, the Chair of Brooklyn NAACP's Civic Engagement Committee echoes this sentiment, testifying that through line warming, Brooklyn NAACP would "remind [voters]

that many people fought hard for their right to vote" and that "they should fight to exercise it even when it is hard or inconvenient." (Bakiriddin Decl. ¶ 23). Brooklyn NAACP "want[s] voters to know that they have support from Brooklyn NAACP volunteers" and "hope[s] that message encourages voters to exercise" their right to vote. (*Id.*)

22. To help convey this message of encouragement, Brooklyn NAACP plans to accompany its line warming activities with informational literature and signage, along with its well-recognized NAACP t-shirts and jackets. (Williams Decl. ¶¶ 10, 37; Bakiriddin Decl. ¶ 22). Brooklyn NAACP "hope[s] that providing water or a modest snack alongside literature and signage will further encourage voters to be informed and steadfast in their commitment to casting their ballot." (Williams Decl. ¶ 37; *see also* Bakiriddin Decl. ¶ 23).

23. Brooklyn NAACP's planned line warming is nonpartisan. "[T]he Brooklyn NAACP's message is *not* that voters should stay in line to vote in support of or against a particular candidate or ballot measure, but rather that they should exercise the franchise and have their own voices heard." (Williams Decl. ¶ 34; Bakiriddin Decl. ¶ 20). Brooklyn NAACP does not "intend to participate in electioneering or other campaign activities while providing voters with free refreshments while they wait in line to cast their ballots." (Williams Decl. ¶ 34).

CONCLUSIONS OF LAW

Brooklyn NAACP has Standing

24. The Brooklyn Branch has standing under Article III of the Constitution to pursue its claims.

25. Article III of the Constitution "limits the jurisdiction of federal courts to Cases and Controversies," thereby "restrict[ing] the authority of federal courts to resolving the legal rights of litigants in actual controversies[.]" *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (cleaned up).

26. To establish standing, a federal plaintiff must prove (1) an "injury in fact," which is an "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). An organizational plaintiff such as Brooklyn NAACP may "independently satisfy the requirements of Article III standing." *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015); *see also Havens Realty Corp. v. Coleman*., 455 U.S. 363, 379 n.19 (1982).

27. Brooklyn NAACP has established an injury in fact sufficient to confer Article III standing. To establish an injury in fact, a plaintiff "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). "To establish standing to obtain prospective relief, a plaintiff must show a likelihood that he will be injured in the future.'" *Carver v. City of New York*, 621 F.3d 221, 228 (2d Cir. 2010) (cleaned up). The plaintiff must face a "substantial risk" of injury, or the threat of injury must be "certainly impending." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). In the context of pre-enforcement challenges, a plaintiff can establish injury through a plausible allegation of their "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," for which "there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

28. Brooklyn NAACP has satisfied this burden. It has shown that it (and its members) intend to engage in conduct violative of the Line Warming Ban, and that it faces a credible threat that the Ban will be enforced against it.

29. Brooklyn NAACP has presented credible testimony describing in detail the line warming activities that it and its members intend to engage in. Brooklyn NAACP President Ms. Williams testifies that "[b]ut for the Ban, Brooklyn NAACP's members and volunteers would provide sundries such as bottled water, granola bars donuts, potato chips, or pizza to voters" waiting in line. (Williams Decl. ¶ 32). The Chair of the Civic Engagement Committee, Ms. Bakiriddin, has explained that Brooklyn NAACP plans to target polling locations that have experienced long wait times in recent election cycles. (Bakiriddin Decl. ¶ 22). No party disputes that Brooklyn NAACP's planned line warming activities are proscribed by the Line Warming Ban.

30. Further, as documented above, Brooklyn NAACP has a deeply vested interest in supporting voters and a long history of engaging in GOTV efforts. "Supporting voters braving long lines on election day is central to Brooklyn NAACP's mission and an extension of its existing community engagement efforts to support all voters in gaining access to the franchise." (Williams Decl. ¶ 11). Brooklyn NAACP's planned activity is consistent with this long history, lending further credibility to its plans.

31. Though Brooklyn NAACP has not previously distributed food and drink to voters waiting in line to vote, it has provided other forms of support to voters waiting in long lines. For example, during the 2020 early voting period, Brooklyn NAACP members and volunteers provided entertainment, face masks, hand sanitizer information, and moral support to voters waiting in long lines at a polling site at Brooklyn's Barclays Center. (Ex. P-8; Ex. P-59; Williams Decl. ¶¶ 21–22; Bakiriddin Decl. ¶ 14).

32. Brooklyn NAACP has also provided food and drink in conjunction with prior efforts to promote voting outside of election day. For example, in 2020, Brooklyn NAACP planned an event billed as "Ballots & BBQ." (Ex. P-21). Though this event was ultimately changed to a

virtual event due to the COVID-19 pandemic, it was originally planned as a community barbecue supporting Brooklyn NAACP's efforts to register and educate voters. (Bakiriddin Decl. ¶ 6). Brooklyn NAACP also provided meals during a "Civic Engagement Session" in January 2023 (Ex. P-16 at NAACP000213; Bakiriddin Decl. ¶ 7). And Brooklyn NAACP regularly provides water and granola bars while "tabling" at public libraries and YMCAs. (Bakiriddin Decl. ¶ 11).

33. This evidence is a far cry from allegations of speculative injuries that courts have found insufficient to support standing. Unlike the plaintiffs in the canonical standing case of *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), Brooklyn NAACP has provided detail on when (during voting hours for upcoming elections) and where (at polling places) its injury would occur. And unlike the plaintiffs in *Faculty v. New York University*, 11 F.4th 68 (2d Cir. 2021), Brooklyn NAACP's injury does not depend on a "highly attenuated chain of possibilities," *id.* at 76–77. Brooklyn NAACP has credibly described concrete plans to engage in prohibited activity that is consistent with a long and well-documented history of voter engagement efforts. It would run afoul of the Line Warming Ban simply by executing on these credibly stated plans.

34. Brooklyn NAACP has also established a credible threat that Plaintiff or its members will be prosecuted for their line warming activities. *See Babbitt*, 442 U.S. at 298. "[I]mminence does not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *Knife Rights*, 802 F.3d at 384 (cleaned up). "[A] credible threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement." *N.H. Right to Life Pol. Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996). Courts are "quite forgiving" to plaintiffs seeking pre-enforcement review and are "willing to presume that the government will enforce the law . . . in the absence of a disavowal by the government or another

reason to conclude that no such intent existed." *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013).

35. It is Defendants' burden to show that the Ban will not be enforced against Brooklyn NAACP or its members. "Courts have not placed the burden on plaintiff to show an intent by the government to enforce the law against it but rather presumed such intent in the absence of a disavowal by the government." *Antonyuk v. Chiumento*, 89 F.4th 271, 334 (2d Cir. 2023) (cleaned up). "[W]here a statute specifically proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Vitagliano v. Cnty. Of Westchester*, 71 F.4th 130, 138 (2d Cir. 2023) (quoting *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019)), *cert denied* No. 23-74, 2023 WL 8531888 (U.S. Dec. 11, 2023) (mem.).

36. Defendants have failed to overcome that presumption. They have not disavowed enforcement of the ban. *See Cayuga Nation v. Tanner*, 824 F.3d 321, 331–32 (2d Cir. 2016) ("Where, as here, there is reason to believe that the plaintiffs will be targets of criminal prosecution, and there has been no disavowal of an intention to prosecute those individuals, the plaintiffs have adequately alleged a credible threat of prosecution."). Instead, Defendants have previously argued that the Ban has been in place for many years, and that *Plaintiff* has not presented any evidence of past enforcement. ECF No. 41-1 at 14. But that is not Plaintiff's burden. "While evidence that a plaintiff faced either previous enforcement actions or a stated threat of future prosecution is, of course, relevant to assessing the credibility of an enforcement threat, none of these cases suggest that such evidence is *necessary* to make out an injury in fact." *Antonyuk*, 89 F.4th at 334 (quoting *Vitagliano*, 71 F.4th at 139) (internal quotation marks and alterations omitted).

37. Because Brooklyn NAACP has established (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest," that is (2) undisputedly "proscribed by" the Line Warming Ban, and (3) that "there exists a credible threat of prosecution thereunder," it has demonstrated an injury in fact under *Babbitt*. 442 U.S. at 298.

38. Brooklyn NAACP also satisfies the remaining elements of standing—traceability and redressability. Traceability requires that the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (cleaned up). "To satisfy the redressability element of Article III standing, a plaintiff must show that it is 'likely, as opposed to merely speculative, that the alleged injury will be redressed by a favorable decision.'" *Soule v. Conn. Ass'n of Schs., Inc.*, 90 F.4th 34, 47 (2d Cir. 2023) (en banc) (quoting *Lujan*, 504 U.S. at 561) (internal alteration omitted). "A plaintiff makes this showing when the relief sought 'would serve to eliminate any effects of' the alleged legal violation that produced the injury in fact." *Id.* (internal alteration omitted) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-06 (1998)). Article III therefore requires only that a judgment in favor of Brooklyn NAACP "'would at least partially redress' the alleged injury." *Id.* at 48 (quoting *Meese v. Keene*, 481 U.S. 465, 476 (1987)).

39. The State Board and the County Board each have the responsibility and authority to enforce the Line Warming Ban. The State Board's mission is to "ensure the integrity of the electoral process in the state of New York, to provide oversight of County Boards of Elections, and the enforcement of state and federal laws as they pertain to elections." (Connolly Tr. 28:22–29:8). New York Law grants the State Board authority to "appoint a special investigator to take charge of the investigation of cases arising under the election law," who "shall have all the powers of a peace officer as set forth in section 2.20 of the criminal procedure law, for the purpose of

enforcing the provisions of this chapter." N.Y. Elec. Law § 3-107. The State Board "shall have jurisdiction of, and be responsible for, the execution and enforcement of the provisions of article fourteen of this chapter *and other statutes governing campaigns, elections and related procedures*." *Id.* § 3-104(1)(b) (emphasis added). The State Board is also empowered to make criminal referrals. (Connolly Tr. 94:6–10)

40. Pursuant to its power to "issue instructions . . . relating to the administration of the election process," N.Y. Elec. Law § 3-102(1), the State Board has directed County Boards to use their "[e]nforcement powers" to "prevent violations of the election process," (Ex. P-27 at NYSBOE 000224), including the Line Warming Ban, (*id.* at NYSBOE 000225); (Connolly Tr. 139:2–140:5); N.Y. Elec. Law § 17-140; *see also* (Connolly Tr. 96:8–11 (testifying that County Boards are responsible for monitoring election law compliance at polling sites)). And County Boards, like the State Board, are empowered to make criminal referrals. (*Id.* at 99:19–100:19).

41. The First Amendment chill that Brooklyn NAACP suffers as a result of the Line Warming Ban is therefore traceable to the Defendants. And the declaratory and injunctive relief that Brooklyn NAACP seeks here therefore "would at least partially redress" its injury. *Meese*, 481 U.S. at 476.

Line Warming is Expressive Conduct

42. Brooklyn NAACP has shown that its planned line warming activities are expressive conduct protected by the First Amendment.

43. The First Amendment's protection extends to symbolic or expressive conduct in addition to the spoken or written word. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004); *see also Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct is entitled to constitutional protection if it is "sufficiently imbued with elements of communication[.]" *Johnson*, 491 U.S. at 404 (quoting *Spence v. State of Washington*, 418 U.S.

405, 409 (1974)). To establish that conduct is expressive, a plaintiff must show both (1) "an intent to convey a 'particularized message'" and (2) "a great likelihood that the message will be understood by those viewing it." *Zalewska v. Cnty. Of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (quoting *Johnson*, 491 U.S. at 404). But an activity need not communicate "a narrow, succinctly articulable message" to satisfy this test. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 569 (1995).

44. Brooklyn NAACP has shown that it intends to communicate a message through line warming. Its president, Ms. Williams, testifies that the organization intends "to convey the importance of [voters] staying in line, the importance of voting, and to emphasize that everyone's vote counts." (Williams Decl. ¶ 33). Ms. Bakiriddin, the Chair of Brooklyn NAACP's Civic Engagement Committee, similarly testifies that she "want[s] voters to know that they have support from NAACP volunteers" and "hope[s] that message encourages voters to exercise" their right to vote. (Bakiriddin Decl. ¶ 23). This message is sufficiently particularized to warrant First Amendment Protection.

45. Plaintiff has also shown a sufficient likelihood that its message will be understood by those viewing it. "[T]he context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410. Factors such as the location and timing of expressive conduct are relevant to how that conduct is likely to be perceived.

46. The Eleventh Circuit has developed a multi-factor test to determine whether conduct is likely to be perceived as expressing a message, in the specific context of food sharing. *See Fort Lauderdale Foot Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018). In *Food Not Bombs*, the Eleventh Circuit concluded that a nonprofit's distribution of food in a

public park was protected by the First Amendment because a reasonable person would understand the event to convey an anti-hunger message. *Id.* at 1238–42. The court considered five factors: (1) that the nonprofit set up tables and banners and distributed literature at its events; (2) that its food sharing events are open to everyone and all are invited to participate and share in the meal; (3) that the events were held in a traditional public forum; (4) that the subject of the intended message related to an "issue of concern in the community," and (5) that the means of conveying the message—sharing food—has a "significance" that "dates back millennia." *Id.* at 1242–43. Each of these factors is also present in this case, establishing that, in context, a reasonable observer is likely to perceive Brooklyn NAACP's line warming as expressive conduct.

47. *First*, the evidence shows that Brooklyn NAACP plans to pair its food sharing with explanatory literature and signage. As at past volunteer events, NAACP members will be identified by t-shirts and jackets bearing the organization's logo. (Williams Decl. ¶¶ 10, 37; Bakiriddin Decl. ¶ 22). Ms. Williams testifies that the NAACP plans to have literature and signage available in conjunction with its line warming activities so that voters standing in line will know that the support they are receiving comes from a trusted and respected source, and that Brooklyn NAACP supports voters exercising their right to vote. (Williams Decl. ¶ 37; *see also* Bakiriddin Decl. ¶ 22).

48. Although Plaintiff has not yet prepared literature specifically for line warming, it has submitted into evidence examples of the types of literature it has distributed at other pro-voting events in the past. (Ex. P-22; Ex. P-23). Brooklyn NAACP's President and Civic Engagement Chair both testify that their volunteers will make similar literature available in conjunction with their planned line warming activities. (Williams Decl. ¶ 37; Bakiriddin Decl. ¶¶ 11, 22).

49. *Second*, Brooklyn NAACP's line warming support will be open to all voters waiting in lines outside of their polling place. (Williams Decl. ¶ 35). That is, the events are "open to everyone." *Food Not Bombs*, 901 F.3d at 1242.

50. *Third*, Brooklyn NAACP's planned activity will take place in public streets outside polling places—a traditional public forum. *See Burson v. Freeman*, 504 U.S. 191, 196–97 (1992) (plurality op.).

51. *Fourth*, long wait times at polls in the City of New York and around the state, along with voter suppression more generally, are significant issues of public concern in New York. As documented above, the State Board of Elections has received voluminous complaints about long wait times from voters and community advocates, including during the most recent presidential election. The issue became so widespread in 2020 that the Attorney General issued an advisory to local boards of elections reminding them of their legal obligations with respect to disabled individuals waiting in long lines. Local and national news organizations have reported extensively on the issue. And long wait times, specifically in the City of New York, have been a topic of intense discussion among the members of the State Board of Elections.

52. *Fifth*, historical context shows that sharing food is a form of expression. As the Eleventh Circuit recognized in a case following *Food Not Bombs*:

> Two millennia ago, Jesus ate with sinners and tax collectors to 'demonstrate that they were not outcasts in his eyes.' In 1621, Native Americans and the pilgrims shared the first thanksgiving to celebrate the harvest. Over two hundred years later, President Lincoln established thanksgiving as a national holiday to express gratitude for the country's blessings of 'fruitful fields and healthful skies.' And Americans continue to celebrate the holiday with traditional foods and family and friends. Both the long history of significant meal sharing and what those meals conveyed—messages of inclusion and gratitude—put an observer on notice of a message from a shared meal.

Burns v. Town of Palm Beach, 999 F.3d 1317, 1345 (11th Cir. 2021) (quoting *Food Not Bombs*, 901 F.3d at 1243). Brooklyn NAACP's planned food sharing is no less expressive.

53. Taken together, these factors demonstrate a great likelihood that observers will understand Plaintiff's line warming activities as expressing some sort of message.

54. Two other courts have reached the same conclusion. Applying the *Food Not Bombs* factors, a Georgia district court concluded that line warming activity similar to what Brooklyn NAACP intends here is expressive. *In re Ga. Senate Bill 202*, No. 1:21-CV-01229-JPB, 2023 WL 5334617, at *7–8 (N.D. Ga. Aug. 18, 2023) ("*S.B. 202 II*"); *see also In re Georgia Senate Bill 202*, 622 F. Supp. 3d 1312, 1327–29 (N.D. Ga. 2022) ("*S.B. 202 I*"). A Florida district court similarly found line warming to be expressive conduct and thus subject to the protections of the First Amendment following a bench trial. *League of Women Voters of Fla., Inc. v. Lee*, 595 F. Supp. 3d 1042, 1129 (N.D. Fla. 2022) ("*LOWV*"), *reversed in part on other grounds sub nom. League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023). The *Food Not Bombs* factors apply to the present case in substantially the same way they applied to the line warming at issue in those two cases.

55. In addition to satisfying the five *Food Not Bombs* contextual factors, Plaintiff has presented direct evidence that voters do in fact subjectively perceive line warming as an expressive act.

56. Brooklyn NAACP presented testimony from Kayla Hart, a voter who has received food and drink while waiting in line at the polls in Atlanta, Georgia. (Decl. of Kayla Hart, ¶ 10). Ms. Hart testifies that in the May 2018 primary election in Georgia, she stood in line for over three hours on a sweltering hot day. (*Id.* ¶¶ 6-8). She was grateful for the snacks, water, and chicken sandwiches being handed out to voters in line. (*Id.* ¶¶ 10-13). She "got the message that the

volunteers cared about [her] right to vote, appreciated that [she] was using [her] voice, and wanted to make sure that [she] was able to cast [her] ballot." (*Id.* ¶ 13). Ms. Hart has "seen people leave long voting lines" in the past and "know[s] firsthand how important it is to ensure that people feel solidarity while waiting to vote, especially in communities of color that feel disenfranchised to begin with." (*Id.* ¶ 14). Ms. Hart's testimony concerning her experience in Georgia further supports the conclusion that a reasonable voter is likely to perceive Brooklyn NAACP's similar line warming conduct as expressing a similar message of solidarity and support. *See S.B. 202 II*, 2023 WL 5334617, at *8 (crediting similar testimony from voters); *S.B. 202 I*, 622 F. Supp. 3d at 1327-29 (same).

57. Additionally, the record shows that, as a result of Brooklyn NAACP's activity supporting and educating voters in Brooklyn, its pro-voting message is well-understood and well-received in the local community. As documented above, Brooklyn NAACP has engaged in extensive voter outreach and education efforts through in-person events, social media campaigns, and direct voter outreach. Some of these events have involved the distribution of food. This context, combined with the fact that Brooklyn NAACP plans to support its line warming message with NAACP-branded apparel, signage, and literature, increases the likelihood that voters receiving food and drink from Brooklyn NAACP will understand their message of solidarity and support.

58. For example, Branch members who participated in Brooklyn NAACP's 2020 event at the Barclays Center recall that voters responded to the distribution of hand sanitizer, face shields, and masks with "welcoming smiles and expressions of gratitude." (Williams Decl. ¶ 28). Voters also demonstrated that they understood Brooklyn NAACP's intended message of solidarity and support with nonverbal gestures such as a thumbs up or a raised fist. (*Id.* ¶ 29). Ms. Bakiriddin

recalls that several voters recognized Branch members through their apparel and signage and their presence at earlier voter registration and GOTV events. (Bakiriddin Decl. ¶¶ 12, 18). The fact that New York voters understood the message of Brooklyn NAACP's similar activity in the past further demonstrates that voters are likely to understand the expressive meaning of Brooklyn NAACP's planned line warming activities. *See LOWV*, 595 F. Supp. 3d at 1129 (crediting similar testimony).

59. Because Brooklyn NAACP's planned line warming activity communicates a particularized message that is likely to be understood by voters, it is expressive conduct that is protected by the First Amendment. And the Line Warming Ban, which undisputedly proscribes that expressive conduct, therefore restricts Brooklyn NAACP's First Amendment rights and those of its members.

The Line Warming Ban is Not Sufficiently Tailored to Withstand Strict or Intermediate Scrutiny

60. Having determined that the Line Warming Ban restricts expressive conduct protected by the First Amendment, the Court must next consider whether the Ban is a justified restriction on that expression. To do so, the Court must first determine what level of scrutiny applies. The Court concludes that strict scrutiny, and not intermediate scrutiny, is the appropriate standard here. But, in any event, the Line Warming Ban cannot survive either level of scrutiny.

61. Laws that target speech "because of the topic discussed or the idea or message expressed"—that is, content-based restrictions—are presumptively unconstitutional and subject to the strictest scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). Laws that limit only the "time, place, or manner" of protected speech, without regard for the content of that speech, are reviewed under an intermediate level of scrutiny. *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (quoting *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984)).

And laws that do not burden expression at all will withstand judicial review if justified by a rational basis. *See Ku Klux Klan*, 356 F.3d at 208.

62. Here, strict scrutiny applies because the Line Warming Ban is a content-based restriction on speech. The Line Warming Ban prohibits only a certain category of expression: gifting "any meat, drink, tobacco, refreshment or provision" to persons other than specified election and campaign officials "in connection with . . . any election." N.Y. Elec. Law § 17-140. It does not prohibit all communication with voters, but instead selectively carves out line warming. Plaintiff could, for example, express its support for voting through written or spoken word, or could sell voters the same snacks it presently wishes to gift to them without running afoul of the Line Warming Ban. Notably New York Law permits electioneering to voters waiting in line outside a 100-foot radius from the polls, but prohibits the expressive act of line warming to those same voters. *See* N.Y. Elec. Law § 8-104; (Connolly Tr. 41:8–42:1). Because the Ban uniquely targets Plaintiff's intended communication, but permits expression on other topics, it is a content-based regulation. *See Burson*, 504 U.S. at 197–98.

63. The Line Warming Ban is also subject to strict scrutiny for the independent reason that it restricts core political speech. "Core political speech" is that which "involves . . . interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). Although Brooklyn NAACP, through its line warming activity, does not support or oppose candidates or ballot measures, its intended message nonetheless concerns "political change"—specifically, encouraging voters to express their voice through the ballot and rejecting policies that have led to long wait times. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 477-78 (2007) (explaining that "issue advocacy" is "core political speech"). "Core political speech" need not involve advocacy for or against candidates or ballot issues. *Id.* at 456 (explaining that "issue

advocacy," as used in this context refers to "speech about public issues more generally," as distinguished from "express advocacy" for or against a particular candidate or ballot measure). "Encouraging others to vote or engage in the political process is the essence of First Amendment expression. At a minimum, discussing the right to vote and urging participation in the political process is a matter of societal concern because voting brings about 'political and social changes desired by the people.'" *VoteAmerica v. Raffensperger*, No. 1:21-CV-01390-JPB, 2023 WL 6296928, at *9 (N.D. Ga. Sept. 27, 2023) (quoting *Meyer*, 486 U.S. at 421) (applying strict scrutiny to restriction on sending pre-filled absentee ballot applications to voters); *see also VoteAmerica v. Schwab*, No. CV-21-2253-KHV, 2023 WL 3251009, at *15–18 (D. Kan. May 4, 2023) (finding that sending personalized mail ballot applications constitutes core political speech and apply strict scrutiny).

64. The intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), does not apply here. *O'Brien*'s intermediate scrutiny applies only when "the governmental purpose in enacting the regulation is unrelated to the suppression of expression." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). That is, it applies only to content-neutral regulations. *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 27 (2010). "If the government interest is related to the content of the expression, . . . then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard." *City of Erie*, 529 U.S. at 289.

65. The precise level of scrutiny is immaterial here, however, because the Line Warming Ban fails constitutional muster under *either* standard. Intermediate scrutiny requires that the challenged restriction must be "narrowly tailored," meaning it is "no greater than essential" to achieving the state's substantial interest. *Young v. N.Y.C. Trans. Auth.*, 903 F.2d 146, 157 (2d Cir. 1990) (quoting *O'Brien*, 391 U.S. at 377). In other words, the regulation "need not be the least

restrictive or least intrusive means" of achieving the state's goal, as strict scrutiny would require, but the state still must show that its interest "would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (internal quotation marks omitted).

66. The Line Warming Ban is not narrowly tailored because it criminalizes a vast amount of conduct that does not implicate the state's interest in shielding voters from undue influence. For one, the Line Warming Ban potentially reaches the entirety of New York's geographic territory. The State may have a legitimate interest in protecting voters from being intimidated or influenced near the polls. But at some distance from the polls, that interest is outweighed by speakers' rights to advocate for candidates and issues. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

67. The Line Warming Ban's broad substantive reach further demonstrates that it is not narrowly tailored to the State's asserted interest in protecting voters from intimidation, influence, or interference. (*See* Connolly Tr. 75:7–11 (listing State's interests)). In addition to banning gift-giving with partisan intention, the Line Warming Ban bars nonpartisan expression like that contemplated by Plaintiff. Offering a voter a bottle of water and a granola bar, with no mention of any candidate or issue on the ballot, does not impair a citizen's ability to vote freely for the candidates of their choice. Nor is there any evidence in the record to suggest that such conduct would be taken as expressing a preference for any candidate, party, or issue.

68. The Line Warming Ban is both overinclusive and underinclusive. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011) (Laws affecting First Amendment rights "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993))). The Ban permits many

types of interactions with voters while prohibiting a vast array of innocent, protected expression. For example, New York law permits partisan organizations to approach voters waiting in line to engage in electioneering, so long as the electioneering occurs outside a 100-foot radius from the poll site. N.Y. Elec. L. § 8-104; (Connolly Tr. 41:8–42:1). But the Line Warming Ban forbids even nonpartisan line warming directed to those same voters. Defendants cannot explain nonpartisan line warming is more likely to influence or intimidate voters than *partisan* electioneering.

69. The Ban also applies only "during the hours of voting"—meaning it does not forbid distributing food and drink to voters waiting in line before the polls open. N.Y. Elec. Law § 17-140; (Connolly Tr. 43:22–44:8). That is no mere hypothetical. In 2020, the City Board saw voters lining up hours before the polls opened for early voting. (Ryan Tr. 88:15–89:5). But the State Board of Elections acknowledges that voters are no more or less likely to experience undue intimidation or influence before the hours of voting. (Connolly Tr. 75:7–76:14; *see also id.* at 45:12–15 (a voter begins the "act of voting" by joining a line before a polling place has open)). There is thus no rational reason to *permit* line warming during pre-voting hours but *prohibit* it while the polls are open.

70. Perhaps most bizarrely, the Line Warming Ban appears to permit the distribution of food and drink having a retail value *under* $1 as long as it occurs *inside* a polling place. This exception appears to allow even *partisan* actors, including party representatives and workers assisting candidates, to distribute such items to voters *inside* a polling place—so long as they are not identified. (Connolly Tr. 66:12–18). And yet the Ban prohibits that same activity *outside* a polling place. (*Id.* at 66:19–67:3).

71. In sum, the Line Warming Ban is a sweeping prohibition that criminalizes significantly more expression than is necessary to protect the integrity of the franchise. And it is

not narrowly tailored to effectively address the State's purported interest in preventing voter harassment and intimidation. It therefore cannot withstand even intermediate scrutiny under *O'Brien*.

72. Because the Line Warming Ban fails under *O'Brien*'s intermediate scrutiny, it certainly does not withstand strict scrutiny. For the same reasons that the Ban is insufficiently tailored under *O'Brien*, it cannot satisfy this more demanding standard. A speech restriction survives strict scrutiny only if it is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). And a law is not the least restrictive means of achieving the state's goal if it targets conduct already criminalized by other state laws. *Id.* at 490–92. Defendants cannot explain how the Line Warming Ban prevents voter intimidation, interference, or influence that is not already regulated by New York's prohibitions on electioneering with 100 feet of a polling place, displaying marked ballots, vote buying, and voter intimidation. *See* N.Y. Elec. Law §§ 8-104(1), 17-130(10), 17-142; 17-212; (*see also* P-44 (the Attorney General citing several provisions of law that protect voters from intimidation and not including the Line Warming Ban)).

The Line Warming Ban is Impermissibly Overbroad

73. "[I]mprecise laws can be attacked on their face under two different doctrines." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). "First, the overbreadth doctrine permits the facial validation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973)). "Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.*

74. "Overbreadth challenges are a form of First Amendment challenge and an exception to the general rule against third-party standing." *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006). Accordingly, "[a] plaintiff claiming overbreadth need not show that the challenged regulation injured his or her First Amendment interests in any way to bring [an] overbreadth challenge." *Id.* at 499. "The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). The second step is to determine whether the challenged statute "criminalizes a substantial amount of protected expressive activity." *Id.* at 297.

75. The Line Warming Ban is facially invalid under the First Amendment because, for the reasons just described, it punishes a substantial amount of protected free speech, judged in relation to its legitimate sweep. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003). The Ban restricts the expressive act of offering food and water to voters in encouragement of their exercise of the franchise. Even if some limitations on this protected right may be permissible, such as prohibiting partisan line warming within a narrow radius of polling places, the Line Warming Ban extends far beyond those limitations. It prohibits both partisan and nonpartisan line warming within potentially all of New York State. Thus, like the similar ban in Florida, it "consumes vast swaths of core First Amendment speech." *LOWV*, 595 F. Supp. 3d at 1138.

The Line Warming Ban is Impermissibly Vague in Violation of the First Amendment and the Due Process Clause of the Fourteenth Amendment

76. The Line Warming Ban also fails constitutional scrutiny for the independent reason that it is impermissibly vague. *See Morales*, 527 U.S. at 52. The Due Process Clause of the Fourteenth Amendment ensures that "no one may be required . . . to speculate as to the meaning of penal statutes." *Farrell*, 449 F.3d at 484–85 (cleaned up). It requires that parties who enforce criminal laws *and* the parties who are regulated by them have fair notice of what conduct is permitted and what conduct is criminal. *Williams*, 553 U.S. at 304. In other words, the vagueness

doctrine ensures that statutes are drafted "with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (cleaned up).

77. Thus, "[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010) (internal citation omitted). The first basis for finding vagueness—lack of warning to regulated parties—is an "objective one" that requires courts to assess "'whether the law presents an ordinary person with sufficient notice of or the opportunity to understand what conduct is prohibited or proscribed,' not whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held to account for the behavior in question." *Dickerson v. Napolitano*, 604 F.3d 732, 745-46 (2d Cir. 2010) (quoting *Thibodeau*, 486 F.3d at 67). The second basis for finding vagueness—lack of sufficient enforcement guidance—invalidates laws that accord "unfettered discretion" to enforcers, *Hayes v. New York Attorney Grievance Committee of the Eighth Judicial District*, 672 F.3d 158, 169 (2d Cir. 2012) (quoting *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir.1999)), or task enforcers with interpreting unclear statutory text without the aid of "statutory definitions, narrowing context, or settled legal meanings," *Williams*, 553 U.S. at 306.

78. "[V]agueness in the law is particularly troubling when First Amendment rights are involved." *Farrell*, 449 F.3d at 485. Where, as here, the statute at issue is "capable of reaching expression sheltered by the First Amendment, the vagueness doctrine would demand a greater degree of specificity than in other contexts." *Melendez v. City of New York.*, 16 F.4th 992, 1015

(2d Cir. 2021) (cleaned up). That is because "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (cleaned up). Statutes that restrict protected speech or association are therefore held to a "more stringent" vagueness test than statutes that do not implicate fundamental rights. *Humanitarian L. Proj.*, 561 U.S. at 19.

79. Applying these principles, the Line Warming Ban is facially vague because it fails to provide persons of reasonable intelligence notice of what conduct it prohibits, and it invites arbitrary and discriminatory enforcement.

80. The statute consists of single run on sentence, with a series of nested exceptions and qualifications to the exceptions. Indeed, the statute's confusing structure is apparently incomprehensible even to the State Board of Elections, whose Rule 30(b)(6) designee at times gave conflicting testimony about what is and is not allowed under the Ban. *Compare* (Connolly Tr. 58:19–59:11 (testifying that political party representatives, among others, are permitted to distribute food worth less than $1 *outside* a polling place) *with id.* at 62:11–64:1 (testifying that same activity is prohibited); *see also id.* at 143:21–144:4 (testifying that line warming is permitted *outside* a polling place if the items are valued at under $1, even though Section 17-140 apparently cabins this exception to line warming *inside* a polling place)). These interpretive difficulties are understandable given the statute's inscrutability. But the result is to "authorize[] or even encourage[] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The First Amendment demands more clarity.

81. Two statutory terms in particular lack the specificity required of criminal statutes. First, the phrase "in connection with or in respect of any election" is indeterminate because it does not provide any territorial limitation. It is not apparent on the face of the statute whether it would apply to an individual who offers snacks to voters in the polling place parking lot before they get in line to vote, or whether it bars Plaintiff from distributing snacks to New York voters on election day at its Brooklyn headquarters.

82. Second, the meaning of the term "provision" in the statutory phrase "meat, drink, tobacco, refreshment or provision" is also not readily apparent. Defendants' proposed limiting construction of the phrase "provision" as embracing only to "consumable goods" similarly fails to cure the term's vagueness. The dictionary definition of the term "provision" includes all "needed materials or supplies." *See Provision*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/provision (last visited January 31, 2024). And even the phrase "consumable" does little to delineate the scope of the statute's prohibition. The dictionary definition of that phrase embraces both food and non-food items. *See Consumable*, Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/consumable (defining "consumable" as "something (such as food or fuel) that is consumable") (last visited January 31, 2024). That is exactly the sort of vague terminology that "authorizes or even encourages arbitrary and discriminatory enforcement." *VIP of Berlin*, 593 F.3d at 186 (internal citation omitted).

83. Indeed, the lack of precision in the term's definition, even under the State Board's limiting construction, is apparent from the State Board's own interpretation of the statute. The State Board's Deputy Director, testifying as the State Board's designee under Federal Rule of Civil Procedure 30(b)(6), indicated that "chewing gum" is a "consumable substance" within the Ban's

prohibition, but hand sanitizer, paper masks, or a pack of tissues—all single-use items—are not. (Connolly Tr. 48:3–49:12).

84. To the extent that the State Board of Elections interprets the term "provisions" to apply only to substances that are "consumable" in the sense that they are ingestible—i.e., food and drink—that interpretation cannot be squared with the statute's text. The Ban specifically prohibits the distribution of "meat, drink, tobacco, [and] *refreshment*." N.Y. Elec. Law § 17-140 (emphasis added). Defendants' construction of the term "provision" would be duplicative of the term "refreshment," thus rendering the term superfluous. *See People v. Galindo*, 38 N.Y.3d 199, 205 (2022) (It is a "core principle of statutory construction that effect and meaning must, if possible, be given to the entire statute and every part and word thereof." (internal quotation marks and citation omitted)); *United States v. Harris*, 838 F.3d 98, 106 (2d Cir. 2016) ("[C]ourts must give effect to all of a statute's provisions so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks and citation omitted)).

85. Brooklyn NAACP has itself struggled with the Ban's imprecision. Ms. Williams and Ms. Bakiriddin testify that, when Brooklyn NAACP was planning to distribute items such as hand sanitizer and face masks to voters, its members were concerned that such items might be considered "provisions," or might be valued at more than one dollar. (Williams Decl. ¶ 22; Bakiriddin Decl. ¶ 15). Although Brooklyn NAACP nonetheless determined to move forward with its plans, the uncertainty they faced demonstrates how vaguely written criminal laws may chill protected First Amendment activity.

86. In short, neither the term "in connection with or in respect of any election nor the term "provision" is "readily susceptible" to any narrowing construction that saves the Ban from

vagueness. *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000). And the Court "may not rewrite a state law to conform it to constitutional requirements." *Id.* (cleaned up).

CONCLUSION

Based upon the above Findings of Fact and Conclusions of Law, Plaintiff respectfully requests that the Court:

1. DECLARE that Section 17-140 of the New York Election Law violates the First Amendment right to free speech and expression;
2. DECLARE that Section 17-140 of the New York Election Law violates the First and Fourteenth Amendments to the United States Constitution because it is impermissibly overbroad;
3. DECLARE that Section 17-140 of the New York Election Law violates the First and Fourteenth Amendments to the United States Constitution because it is impermissibly vague; and
4. ENJOIN Defendants, their respective agents, officer, employees, and successors, and all persons acting in concert with each or any of them, from enforcing Section 17-140 of the New York Election Law.

Dated: February 7, 2024

Respectfully submitted,

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